

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BETTY STARK Claimant

VS.

WILLARD'S IGA
Respondent

AND

HANOVER INSURANCE COMPANY
Insurance Carrier

Docket No. 199,486

ORDER

Respondent filed an Application for Review of a Preliminary Hearing Order entered by Administrative Law Judge Robert H. Foerschler dated August 10, 1995.

ISSUES

Respondent requests Appeals Board review of the issue of whether claimant's personal injury arose out of and in the course of her employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Whether claimant suffered a work-related injury is an issue set forth in K.S.A. 44-534a(a)(2) that grants the Appeals Board authority to review a preliminary hearing order.

Claimant seeks medical treatment for continuing pain in her right neck area, right medial scapula area, right arm and right shoulder. Arthur B. Jenny, M.D., examined the claimant at the request of her attorney on March 29, 1995. He diagnosed claimant with neck and shoulder strain related to an injury she received on July 16, 1994 while she was at work. Dr. Jenny recommended diagnostic x-rays, a repeat magnetic resonance scan and EMG if needed. Dr. Jenny also recommended a second physical therapy opinion with instructions to do isometric neck and shoulder girdle exercises.

Claimant testified that she was injured while she was working for the respondent on July 16, 1994 in the performance of her duties of sacking groceries. A fellow employee, Scott McCray, sixteen (16) years of age, without provocation, grabbed the claimant, put her head in a headlock, pulled her right arm up behind her head and turned her neck hard to the right. Claimant testified that she had no idea why this employee attacked her. She specifically denies that, prior to the incident, she untied Scott McCray's apron strings.

Claimant received medical treatment for her injuries from her personal physician which was furnished by respondent. However, her neck, and right shoulder and right arm remain symptomatic at the time of the preliminary hearing and she is requesting further medical treatment to be furnished by the respondent. The Administrative Law Judge found that claimant's injuries were a result of an accident that arose out of and in the course of her employment with the respondent. He rejected respondent's argument that her injuries were a result of horseplay and, thus, not work related. The Administrative Law Judge found that the claimant had not provoked the assault by the fellow employee and although the employee's actions were not condoned by the employer or permitted by the employer, the claimant's injuries are compensable.

The Appeals Board agrees with the analysis of the Administrative Law Judge and, therefore, affirms his finding that claimant's personal injuries arose out of and in the course of her employment with the respondent. See Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, 455 P.2d 546 (1969); Springston v. IML Freight, Inc., 10 Kan App. 2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Robert H. Foerschler, dated August 10, 1995 should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy E. Power, Overland Park, Kansas
Michael J. Joshi, Kansas City, Missouri
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director